IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1174

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union,
Petitioner,

vs.

GEORGIA RAILROAD, the Trade Name of the Louisville & Nashville Railroad Company and Seaboard Coast Line Railroad Company, as Lessees of the Properties of Georgia Railroad and Banking Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The statement in the Petition on this subject is adequate.

JURISDICTION

The jurisdictional statement in the Petition is adequate.

QUESTIONS PRESENTED

We would respectfully differ from the phraseology of the question as presented by the Union in its application for certiorari. This application being one for review of an opinion by the United States Court of Appeals for the Fifth Circuit affirming a denial by the District Court of a requested preliminary injunction, we believe the true legal question more properly is:

> Whether the District Court has abused its discretion in denying a preliminary injunction to a union which sought to prevent the railroad from modifying its schedule by abolishing certain train and crew assignments and replacing them with other train and crew assignments.

Since the District Court held that:

(a) the schedule change involved did not involve a change in any working conditions which were then currently the subject of any negotiations under the railway labor act (and thus the status quo provisions of the Railway Labor Act did not apply), and

(b) no irreparable injury would occur to the plaintiff, and its members, if a preliminary injunction were denied, the ultimate question is thus whether the evidence demanded a contrary ruling on not just one, but on both grounds.

STATUTES INVOLVED

This case involves the Railway Labor Act, particularly §§ 6 and 10, 44 Stat. 582, as amended, 48 Stat. 1197 (45 U.S.C.A., §§ 156, 160).

STATEMENT

A. Procedural History.

A complaint was filed in this case on January 21, 1971 and served on the railroad the same day. On that same day, a hearing was scheduled for the afternoon of the 22nd of January, the very next day, on the request for a preliminary injunction. The hearing on the 22nd was relatively brief, due to the fact that it was the occasion of the funeral of Senator Richard B. Russell, and that day was considered as a partial federal court holiday in Georgia. Nevertheless, each side put up one witness and several documents were introduced.

At the close of the evidence, the Court indicated that if the union wished to have a temporary restraining order issued to prevent the schedule changes from being put into effect while the Court took the matter under advisement, further evidence would be necessary in order to establish the amount of an appropriate bond to be posted by the union. At that point, most significantly, the union indicated that it could do without a temporary restraining order under those circumstances, and thus the schedule changes went into effect. (The railroad had indicated that it would comply with whatever order the Court were to issue in the matter, without regard to whether the "status quo" was the status quo as of the date of the order or the status quo as of the date of the hearing.)

An order was subsequently issued denying the preliminary injunction, which order was appealed to the Court of Appeals for the Fifth Circuit. After an affirmance by that Court, this Application for Certiorari was brought. Since that one brief hearing more than a year ago, no further action has taken place in the district court.

B. **General Background of the Dispute.**

Since a key element in the union's position consists of a notice served under the Railway Labor Act by this railroad two and one-half years ago, long before this dispute arose, it is not inappropriate at this point to summarize this incident. On October 20, 1969, a notice was sent to the railroad by the local General Chairman of the United Transportation Union on this railroad, which constituted a notice under § 6 of the Railway Labor Act of the union's desire to change its contract with the railroad in numerous areas not pertinent to this dispute. On November 6, 1969, as part of a coordinated national strategy designed to bring to a head the so-called "work-rules" dispute with the operating unions, this railroad, along with more than a hundred others throughout the country, served a lengthy package of counter-proposals. Because the individual railroads are the contracting parties, these notices were served individually by each railroad, but were shortly thereafter, in accord with normal bargaining procedures in such matters, referred to the National Railway Labor Conference and the Southeastern Carriers Conference Committee for national concerted handling.

Thereafter, no agreement was reached, a Presidential Emergency Board was established, and finally Congress extended by statute the § 10 freeze on working conditions in dispute until March 1, 1971. See P.L. 91-541; H.R. No. 91-1686 (3 U.S.C.C.A.N. 4879 [1970]). It is not in the record, but the UTU finally ratified the agreement in January 1972 after a long delay and the work-rules dispute is now over, at least for the time being.

To the extent the union's claim rests upon the Section 6 notice at all, and thus upon the status quo provisions of Sections 6 and 10, the dispute is now surely moot, since, as noted, the work rules dispute has been settled by agreement and there are no Section 6 notices outstanding involved in this case.

C. The Actual Dispute on the Georgia Railroad.

The Georgia Railroad has essentially a Y-shaped route structure, with the terminal points being Macon, Augusta and Atlanta. The junction point of these lines is a place called Camak, a small town about two miles from a nearby county seat. Camak itself is essentially nothing more than a town which exists because of the proximity of the railroad switching yard there. Although the union representative maintained that to the extent of his own knowledge, local freight trains from Macon had not tied up or ended their run at Camak since the late 1940's, the railroad's witness and documentary evidence introduced in the form of schedules and timetables showed that Macon branch trains had tied up at Camak at various times during the 1950's and during the 1960's as well. In addition, the attention of the trial court and of the Court of Appeals were directed to Award No. 13372 of the First Division of the National Railroad Adjustment Board which dealt with a dispute which arose in 1947 over the **abolition** of Camak as an end-point for the Macon run, which award recounted the long history of Camak as a junction point. That award held that under the then existing contract, the railroad did have the right to move the terminal point from Camak to Augusta, if it so chose.

In accord with what had by then become relatively well-established practices, on January 17, 1971, the railroad posted a notice that effective on January 22 and January 23, 1971, the Augusta-Macon trains and crew assignments would be abolished and a new train from Macon to Camak would be established. New crew assignments were to be made for the new run. (The contracts, which were introduced, provided that men could bid on new jobs in order of their seniority, in accord with established rules on this railroad.) It was this change which the union sought to prevent by the issuance of the preliminary injunction.

ARGUMENT

The petition for certiorari should be denied for one very simple and cogent reason: It absolutely fails to set forth any single legitimate ground as to why certiorari should be granted. That burden being upon the petitioner, and it having failed to carry it, there is no reason why this Court should occupy itself with this case and delay still further the possibility of allowing the parties a full and final resolution of the matter by trial in the District Court.

To summarize these deficiencies, very briefly, petitioner has shown absolutely no conflict between any courts in interpreting the relevant statute and case law. As a matter of fact, the Courts of Appeals of four circuits have now had occasion to consider and apply the holding and implications of **Detroit and Toledo Shoreline R.R. v. United Transportation Union**, 396 U.S. 142, 24 L. Ed. 2d 325, 90 S. Ct. 294 (1969), upon which the union relies (as well as the railroad), and none of the holdings of these Courts, much less the one in question here from the Fifth Circuit, are in conflict either with each other or in conflict with the holding of this Court. Indeed, the District Court and the Court of Appeals in this case have expressly considered **Shoreline** in making their rulings, as the record shows.

Petitioner itself acknowledges that the only question in this case is the correctness of the judgment made by the District Court in evaluating and weighing evidence presented in a very hasty and abbreviated hearing upon the question of whether or not to grant a preliminary injunction. The standard set by this Court in such matters is so well known that it can almost be recited by heart:

> "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right; even though irreparable injury may other-

wise result to the plaintiff. . . . Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd. v. John Wanamaker, 253 US 136, 141, 40 S Ct 463, 64 L ed 822; Rice & Adams Corp. v. Lathrop, 278 US 509, 514, 49 S Ct 220, 73 L ed 480. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. Prendergast v. New York Te. Co., 262 US 43, 51, 43 S Ct 466, 67 L ed 853; Ohio Oil Co. v. Conway, 279 US 813, 815, 49 S Ct 256, 73 L ed 972." **Yakus v. United States**, 321 US 414, 440, 64 S Ct 660, 88 L ed 834 (1944).

The process by which a district judge arrives at a decision in such cases was well summarized by Judge Bazelon of the Court of Appeals for the District of Columbia as follows:

"When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally. A mere listing of the guiding considerations demonstrate their intangible nature, especially when no attempt is made at this stage to decide finally the ques-

tions raised." **Perry v. Perry,** 190 F. 2d 601 at 602 (1951).

It may be useful to present in summary form the issues before the District Court in this case with reference to those considerations. To the extent that the union initially based its claim to a preliminary injunction upon the concept that there would be some **irreparable** injury to its members from moving the crew terminal for two trains from Augusta to Camak, it fairly well obliterated its own position in the following interchange:

"The Court: All right. Then I need to get to the procedure we are going to follow. I assume you all want me to read the cases and make a decision on it. That is going to take some time. The weekend is going to pass before that happens. Now Mr. Major, I assume that there is no question that if I should enter a temporary injunction sometime after these changes are made that there is no question that the schedule would have to go back into effect. If not, then we need, it poses a question of whether we need a medial—right now pending decision.

"Mr. Major: Your Honor, we will roll back to comply with whatever the court rules. I wouldn't question your right to make us roll back.

"The Court: That applies to both. If I do that, that implies certain benefits with respect to the employees. I don't know what they may be.

"Mr. Major: Yes, sir, that would. I don't know what they might be.

"Mr. Lewis: Do I understand the court to mean that if, that it would allow these changes to go into effect as of tomorrow and then if you rule in favor of the union——

"The Court: That is what I am inquiring. It seems to me I have the alternative or else putting on evi-

dence as to the economic cost to the railroad, making you put a bond.

"Mr. Lewis: Yes, sir. Since Mr. Major said they will comply with the order and roll back, or however it was expressed, then we will go that route."

If, to the extent any employee was inconvenienced (which we will come to in a moment) by the change from Augusta to Camak, and that inconvenience was alleged to represent an irreparable injury, that position is difficult to square with the union's obvious willing acceptance of a "little" irreparable injury as an alternative to another fifteen minutes of testimony. Nor does it square with an apparently tacit agreement that if the railroad was in error in changing the schedule, then the men could be adequately financially compensated. Nor was the Court in a position to place much weight on the union's ultimate likelihood of success when the union was apparently unwilling itself to risk exposure to a counterclaim from the railroad if the union's claim turned out to be unfounded.

Further, while the union here has cleverly tried to create the impression of battalions of employees driving about the Georgia countryside in search of their "home terminal", respondents know of no statement they can legitimately make other than that the evidence contains no foundation for the assertion repeatedly made by the petitioner in its application that the effect of the change was to cause the employees represented by plaintiff to drive on their own time an additional 47 miles to report for work and an additional 47 miles to arrive home after being released from work than they were required to prior to the change in the crew terminal from Augusta to Camak. There is simply not one shred of evidence in the record as to where the new crews which were to go on duty with the schedule change lived, and absolutely no evidence as to where the old crews lived. Forty-seven miles is the distance from the center of Augusta to the center of Camak

(by railroad) but that is the only evidence in the record. Petitioner may wish he had put some evidence in the record on this point, assuming he had some, but there simply is none to be seen.[1] To be sure the dissenting judge in the Fifth Circuit Court of Appeals even recited this contention as a "fact" in his opinion, but there is no such "fact" in the evidence. Undoubtedly he relied upon such statements in the brief in that court, rather than the record. All this is merely illustrative of the evidence that the district judge properly exercised his discretion upon the limited evidence in front of him and found that the union had not shown any irreparable injury.

Indeed, even assuming *arguendo*, which is not the case, that all the employees on the old trains leaving from Augusta had been directed to serve on the new train leaving from Camak, and that they all did have to go from Augusta to Camak and back each day, this would still not represent irreparable injury. As the union has conceded such a claim would present nothing more than a time and mileage claim at best and would be clearly compensable, if not under a specific contract clause, then certainly by a monetary damage claim. Against this was balanced the uncontroverted evidence presented by the railroad that its good faith estimate was that it could not comply with the Hours of Service Law by continuing to run the train from Augusta to Macon in one day. The only other solution, if the railroad was not to be allowed to use Camak as an outlying crew terminal, was either to reduce service to the public or, presumably put additional trains on the run, and there was no evidence put on by any party that either equipment or crews were available for such extra service. Under these circumstances, it would seem difficult for the

[1] While we are in the area of might-have-beens, when the case returns to the District Court for serious evidentiary hearings, the railroad fully expects to show that some of the employees on the new train did in fact live in Camak and others of them lived closer to Camak than they did to Augusta.

union to contend that the district court abused its discretion in ruling that no irreparable injury had been shown by the union, and in ruling in effect that the balancing of damage and convenience generally lay against granting the preliminary injunction.

Other than these predominating evidentiary questions the only legal point in question is whether or not the district court properly applied Sections 6 and 10 of the Railway Labor Act. The key wording of Section 10 which is comparable to Section 6, and (which refers to the creation of an emergency board to handle the final step under the Railway Labor Act's procedures for resolving major disputes) provides:

> "After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."[2]

The District Court held that this provision did not apply to this case, and the Court of Appeals affirmed after "a careful examination of the record" in which it found:

> "That there is ample evidence to indicate that the designation of tie-up or layover points as the terminal for assigned crews was not a subject of prior dispute of the union and the railroad but was a matter reserved by practice if not by contract to the railroad. It was therefore not included in the railroad's Section 6 Notice of November, 1969."

In other words, although the § 6 notice did contain within its many paragraphs, representing a supermarket collection of maximum demands, each of which reflected

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[2] Section 10 is significant in this because at the time this dispute arose the work-rules controversy was then before a Presidential Emergency Board, and the thirty day limit had been extended by P.L. 91-541 to expire on March 1, 1971.

the needs of at least one but not necessarily all of the railroads making these coordinated proposals, a phrase broad enough to include moving crew terminals at will the court found that the status quo provisions of the act did not apply because the § 6 notice did not relate to any manner which was in dispute at the time it was served. Alternatively put, the "status quo" on this railroad was that the railroad had the option of moving the terminus of the Macon run as it needed.[3]

In **Shoreline**, this Court considered in depth the legislative history of Sections 6 and 10 of the Railway Labor Act, which conclusively showed that it was only those conditions which were actually in controversy which were to remain in the status quo during negotiations pursuant

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[3] The applicants have continued to confuse the issue between crew and home terminals in a fashion which leads respondents to ponder whether the confusion is not a result of a misunderstanding but a means to an end. The testimony is absolutely clear that "home terminal" is a word of art which designates a point on a railroad from which relief crews and extra men are detailed to fill specific "assigned" jobs. If the unassigned jobs commence at some intermediate point away from the railroad "home terminal" then the men are paid to "dead head" to the assignment and back to the railroad home terminal, which is now Augusta, and always has been Augusta. A "crew terminal" on the other hand, is the place from which an **assigned** or regular crew goes on or off duty. The respondents have labored long and hard over the following words in the notice of January 15, 1971:

"First crew on duty at Camak train No. 31 9:01 A.M., to depart Camak on No. 31's schedule, or extra, Sunday, January 24, 1971, returning on No. 30's schedule, or extra, from Macon to Camak Monday, January 24, 1971 and will operate in this manner thereafter, with layover at Camak on Saturday with Camak being home terminal."

It is the use of the words "home terminal" in this memorandum notice which apparently has enraptured the union's interest in this case, although the railroad's testimony was unequivocal that there was no intention to change the "railroad home terminal"; only an intention to specify that Camak would thereafter be the crew "home terminal." (We are almost embarrassed to burden this Court with such matters, but it is petitioners who continue to argue some significance into these words.)

to a Section 6 notice. See 396 U.S. at 153-54, Notes 19 and 20. Matters which are not in controversy are not limited by the status quo provisions. The lower courts in this case have simply found as a matter of fact that there was no evidence of any controversy concerning the right of the railroad to move the tie-up points for assigned crews, and indeed there was some evidence that at least since the NRAB award mentioned previously, both parties had had a substantial foundation for believing that the railroad did have that right explicitly. Thus, the mere fact that this railroad, as one of a hundred others, filed a broad blanket Section 6 notice neither automatically put the existence of that right in controversy on this railroad, nor did it create any evidentiary presumption that the railroad did not already have the right it sought to put into the contract terms. That is really all there is to this case, and this should hardly warrant the grant of certiorari by this Court.

Even if this Court should wish to take a second look at the concept advanced in **Shoreline**, which we would normally believe might well be warranted, the context of this case hardly presents a structure in which to do so. As indicated previously, the evidence was most hastily presented—the oral evidence taken by the district court, not including colloquy of counsel, does not exceed 45 letter size pages of double space typescript, presented without any pre-trial discovery and with a great deal of wasted effort in getting to matters that were of genuine significance. If there is a serious question here, which respondents genuinely doubt, it can only be satisfactorily considered by this Court after a full evidentiary hearing.

So far we have not touched upon the fact that there has not yet been a definitive resolution of the question, steadfastly maintained by the railroad (contrary to the assertion in the petition) of whether the existing contract with the union held by this railroad actually provides or

reasonably implies that the railroad already has a right under the contract to move the crew terminals. If the railroad does in fact have this contract right (which is not so unreasonable to conceive, bearing in mind that at the time the contract was made the tie-up point was at Camak) the dispute would no longer even be in Court. Of course, under **Slocum v. Delaware, L.&W.R.R.**, 339 U.S. 239, 94 L.Ed. 795 (1950), such a contract interpretation can only be made by the National Railroad Adjustment Board or possibly by the National Mediation Board, and not by the District Court. Thus consideration now by the District Court might well be premature.

CONCLUSION

It is genuinely difficult to conceive why the respondents have brought this case to this Court in its present posture. The meagerness of the record is surpassed only by the paucity of the matters with which the Court would have to deal. All that is sought is a review of evidence taken on an application for a preliminary injunction, upon which the District Court ruled, well within its discretion, that the union had showed no irreparable injury, and further, had not carried its burden of showing that the railroad planned to make a change in working conditions which were presently in dispute between this railroad and this union. This being the case, the petition for certiorari should surely be denied.

Respectfully submitted

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APPENDIX

RAILWAY LABOR ACT, SECTION 2

Seventh. No carrier, its officers, or agents shall change the rates of pay rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

RAILWAY LABOR ACT, SECTION 6

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, §6, 44 Stat. 582; June 21, 1934, c. 691, §6, 48 Stat. 1197.

RAILWAY LABOR ACT, SECTION 10

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board,

threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: **Provided, however,** That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, §10, 44 Stat. 586; June 21, 1934, c. 691, §7, 48 Stat. 1197.

PUBLIC LAW 91-541; 84 STAT. 1407

[H.J. Res. 1413]

Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the current railway labor-management dispute.

Whereas the labor dispute between the carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees and certain of their employees represented by the United Transportation Union, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Brotherhood of Maintenance of Way Employees, Hotel and Restaurant Employees and Bartenders International Union threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas the recommendations of Presidential Emergency Board Numbered 178 for settlement of this dispute did not result in a settlement: Now, therefore, in order to

encourage these parties to reach their own agreement, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The provisions of the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period with respect to the above dispute, so that no change, except by agreement, shall be made by the carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees or by their employees, in the conditions out of which such dispute arose prior to 12:01 antemeridian of March 1, 1971.

Sec. 2. Not later than fifteen days prior to the expiration date specified in the first section of this joint resolution the President shall submit to the Congress a full and comprehensive report containing—

(1) the progress, if any, of negotiations between the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees and their employees; and

(2) any such recommendations for a proposed solution of the dispute described in this joint resolution as he deems appropriate.

Sec. 3. Notwithstanding the first section of this joint resolution, the rates of pay of all employees who are subject to the first section of this resolution shall be increased by 5 percent effective as of January 1, 1970, and by 32 cents per hour effective as of November 1, 1970. Nothing in this section shall prevent any change made by agreement in the increases in rates of pay provided pursuant to this section.

Approved December 10, 1970.